PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1953
No. 438

R 154

FOREST LAWN MEMORIAL-PARK ASSOCIATION, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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FOREST LAWN MEMORIAL-PARK ASSOCIATION, INC.,
Petitioner,

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NATIONAL LABOR RELATIONS BOARD,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Forest Lawn Memorial-Park Association, Inc., prays that a Writ of Certiorari issue to review the decree of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on September 16, 1953, and respectfully shows:

Opinions Below.

Decision and Order of the National Labor Relations Board [R. 50] are reported at 97 N. L. R. B. 309 (1951). The opinion of the Court of Appeals [R. 154] has not yet been officially reported.

Jurisdictional Statement.

The statute believed to sustain the jurisdiction of this Court is Section 1254 of Title 28 of the United States Code.

Questions Presented.

1. Did petitioner engage in labor activities affecting commerce within the meaning of the Act or within the meaning of the Commerce Clause of the United States Constitution?

2. By reenactment of the National Labor Relations Act in 1947 did Congress give the force of law to prior National Labor Relations Board policy of refusing to assert jurisdiction over mortuaries and cemeteries?

3. Did the court below err in holding that the order of the Board could be enforced against petitioner at a time when it is not (if it was ever) subject to the provisions of the National Labor Relations Act?

Statute Involved.

The statute, the proper application of which is involved, is the National Labor Relations Act as amended (Secs. 151 *et seq.* of Tit. 29, U. S. C.), which confers power upon the National Labor Relations Board to prevent persons from engaging in unfair labor practices affecting commerce. Pertinent provisions of the Act are set forth in the Appendix.

Summary Statement of the Case.

1. Summary of Procedure Below.

Petitioner seeks review of a decree of the United States Court of Appeals for the Ninth Circuit filed September 16, 1953, enforcing an order of the National Labor Relations Board directing petitioner to take certain action regarding the alleged commission of certain unfair labor practices by petitioner [R. 158].

After filing by the Union of an unfair labor practice charge against petitioner [R. 1], the Board issued its complaint based thereon (Case No. 21-CA-1077) [R. 3], and a hearing before a Trial Examiner of the Board was conducted [R. 59]. Facts bearing on the interstate commerce question were stipulated by counsel and admitted in evidence [R. 19, 61].

Petitioner had served subpoenas *duces tecum* on each of the members of the National Labor Relations Board to appear at the hearing with certain files and records of the Board [R. 13-19, 63], to prove that at all times prior to the enactment of the Taft-Hartley Act and for several years thereafter, the Board had an established policy under which it refused to assert jurisdiction over mortuaries and cemeteries. After extended discussion between counsel and the Trial Examiner [R. 63, 74-85, 93-94], during which the existence of such policy was undisputed, and on motion of counsel for the Board members the Trial Examiner quashed the subpenas [R. 86].

Then petitioner moved for a dismissal of the complaint for lack of jurisdiction on the ground that it was not engaged in commerce within the meaning of the National Labor Relations Act, and that none of its labor practices could affect commerce within the meaning of the Act. The Trial Examiner reserved decision on this motion and petitioner withdrew from the hearing, preferring to rest its entire defense upon what it regarded as a clear-cut lack of jurisdiction of the subject matter [R. 94].

After the hearing the Trial Examiner issued his Intermediate Report denying petitioner's motion to dismiss [R. 32] and finding that petitioner had committed unfair labor practices affecting commerce within the meaning of the Act [R. 36].

The Board adopted the Trial Examiner's finding in its decision and order [R. 50] and subsequently petitioned the Court of Appeals for the Ninth Circuit for enforcement of its order [R. 143].

Thereupon petitioner moved the Court of Appeals for leave to adduce additional evidence, on the basis of supporting affidavits showing that petitioner had changed its method of operation so that it no longer handled remains of deceased persons which the families intended to ship outside the state, and had substantially reduced the volume of its purchases originating out of state [Supp. Record 167]. The court denied such motion on or about June 24, 1952 [Supp. Record 173], reported in *National Labor Relations Board v. Forest Lawn Memorial-Park Association,* 198 F. 2d 71 (9th Cir., 1952).

Following the receipt of briefs and hearing of oral argument on the jurisdictional issue, the Court of Ap-

peals entered its decree on September 16, 1953, enforcing the Board's order [R. 158].

On application of petitioner issuance of mandate has been stayed by such court pending the filing of this petition on or before October 26, 1953, such date to be continued pending the final disposition of the case by the Supreme Court of the United States.

2. Summary of Facts Pertaining to the Jurisdictional Issue.

Petitioner is a non-stock, non-profit cemetery association of lot owners in Forest Lawn Memorial-Park (hereinafter called "Forest Lawn"), an operation which began in 1906 [R. 19, 20] and which has included the operation of a mortuary located within the cemetery grounds since 1933 [R. 20]. Petitioner is but one of 75 private cemeteries in Los Angeles County, California, and of 50,000 in the United States. There are in excess of 150 mortuary concerns in Los Angeles County and over 25,000 in the United States [R. 27].

Forest Lawn is an integrated operation, containing within a sacred memorial park a mausoleum, three interdenominational churches, a mortuary, and hundreds of art treasures including paintings, statuary, stained glass and architectural masterpieces.

The labor practices complained of involved only embalmers employed at petitioner's mortuary, which is only one of 27 different departments. The mortuary has been adjudicated by the California Supreme Court to be but an incidental feature of petitioner's primary function of operating a cemetery. *Wing v. Forest Lawn Cemetery Association*, 15 Cal. 2d 472, 101 P. 2d 1099 (1940).

Petitioner's receipts during the 12 months' period ending April 30, 1951, totaled $4,621,803.00, coming from sales of cemetery properties, services and supplies, including graves, crypts, niches, interment charges, cremations and mortuary services. There were 6,115 sales of cemetery properties and 5,905 interments. [R. 21].

In the same 12 months' period petitioner purchased capital equipment, materials, and supplies for Forest Lawn Memorial-Park as a whole of a value of $1,242,-244.00. Of this total amount, only $40,452.00 worth was shipped to petitioner directly from out of state. $216,-884.00 worth of the items purchased locally and shipped from establishments located in California had its original source outside the state. Approximately 50%, or $128,-568.00, of the purchases directly or indirectly originating out of state consisted of capital equipment for the cemetery, such as marble statuary and other objects de art, seats for the Hall of Crucifixion, water pipes, furniture and fixtures, etc. Such purchases for the preceding five years averaged only $50,000.00 [R. 20, 21].

In the same 12 months' period petitioner handled 3,870 mortuary cases, of which 97% were concluded by interment in the State of California [R. 21, 22]. In most of the remaining cases, which the families ultimately had shipped for burial out of California, petitioner furnished all of its customary funeral and mortuary services which were locally performed [R. 22, 23]. The nature of such services is as follows:

When a death occurs, upon a call from a member of the deceased's family, petitioner's specially trained employee goes to the home or hospital, prepares the body for movement, and then transports the body by car to

petitioner's mortuary. There petitoner embalms the body, performs cosmetic and restoration skills to remove the pallor of death and make the deceased appear as natural in life as possible, and dresses the body in the proper clothing. The body is then placed in a casket selected by the family, and the deceased is positioned in a reposing or slumber room where the relatives and friends may view the body. The funeral director prepares the death certificate, obtains the attending doctor's signature thereto, and files the same. He also obtains the necessary interment permit, and places an obituary notice in a local newspaper.

Within two or three days after death at a time selected by the family, the funeral director arranges and conducts the funeral services in one of the three Forest Lawn churches, or very rarely, in a church outside of Forest Lawn. Petitioner brings the family to the service in one or more limousines. The funeral director and his assistants place the casket near the altar, arrange the flowers in the chapel, furnish the altar and other accoutrements for the faith of the deceased, usher the friends and relatives into the chapel, open and close the religious ceremony, and furnish organist, soloist, attendants, and casket bearers, if requested. Then the body. the family, and the flowers are transported to the resting place at Forest Lawn and graveside rites are conducted. Through it all petitioner counsels, advises, and comforts the family of the deceased.

There is no separate charge made for any one element of these many services, and after the services have been performed, there is nothing of tangible value to show for them [R. 22, 23]. No goods are created by peti-

tioner, it only performs a local service of a highly personal and confidential nature. In all cases where out-of-state shipment occurred, petitioner acted only as agent without compensation, making the arrangements for the clients who were the consignors, who paid all shipping charges [R. 23, 24]. Even the Trial Examiner recognized that the services of petitioner in connection with the transportation of the bodies was merely an accommodation to the clients. In footnote 1 of his Intermediate Report he found it proper to exclude the figure of $5,700.00 (transportation charges) from the figure used in determining jurisdiction, inasmuch as it represented expenditures for services performed by the carriers [R. 34].

Of the cases concluded by out-of-state burial, only four-tenth of one per cent (.004) were handled for out-of-state clients. These paid a total of $9,337.00 for the usual locally performed mortuary services, of which one-third, or $3,112.00, represented the value of caskets, and in addition paid $640.00 for shipping cases. Thus, receipts from caskets and shipping cases totalled only $3,752.00, which was only .08% of the total receipts for the year ($4,621,803.00).

Local clients, who themselves made the remaining out-of-state shipments, paid $40,150.00 for the usual locally performed mortuary services, of which one-third, or $13,383.00, represented the value of caskets, and in addition paid $3,445.00 for shipping cases. Thus, receipts from such caskets and shipping cases totalled only .36% of the total receipts of petitioner for the year [R. 22, 23].

Specification of Errors.

The Court of Appeals erred:

(1) In holding that petitioner engaged in labor activities affecting commerce within the meaning of the Act.

(2) In holding that reenactment of the Labor Act did not give the force of law to prior Board policy of refusing to assert jurisdiction over cemeteries and mortuaries.

(3) In failing to remand the proceeding to the Board for the receipt of evidence establishing the Board's prior practice with regard to cemetery and mortuary cases.

(4) In failing to find that Congress intended that cemeteries and mortuaries are and should remain beyond the jurisdiction of the Board.

(5) In failing to hold that reversal by the Board of its long-standing rule of hearing cases involving mortuaries or cemeteries amounted to the issuance of a rule of general policy required by the Administrative Procedure Act to have been published in the Federal Register.

(6) In failing to remand the case to the National Labor Relations Board for the receipt of further evidence, showing that petitioner has not shipped bodies out of state since the first of 1952 and has substantially reduced its purchases of materials originating out of state.

(7) In enforcing the Board's order.

(8) In granting prospective effect to the Board's order.

Reasons Relied on for Allowance of the Writ.

1. **In View of the Large Number of Cemeteries, Mortuaries, and Other Organizations Performing Local Professional Services, It Is of National Importance for This Court to Decide Whether Labor Activities of Such Organizations Affect Commerce Within the Meaning of the National Labor Relations Act or the Constitution.**

So far as has been determined the Court of Appeals for the Ninth Circuit is the only federal court having decided whether the labor practices of a cemetery or mortuary could affect commerce within the meaning of the Act or Constitution.[1] Due to the fact that such activities are not commercial and do not involve production in the ordinary sense but partake of a professional nature, and considering the large number of organizations similar to petitioner which are affected by the decision below, this important question calls for final decision by the United States Supreme Court.

Jurisdiction was based in large part by the court below upon the fact that in a small percentage of the mortuary cases handled by petitioner, the human remains, after petitioner has performed all its services, were taken outside the state for burial. This result was reached even though it was the clients who were consignors and petitioner acted only as their agent. In such a case no transportation of *goods* in the accepted sense takes place. A dead body is not a commodity. It is not even property in the usual sense. *Gray v. Southern Pacific Co.*, 21 Cal. App. 2d 240, 68 P. 2d 1011 (1937); *Steen v. Whit-*

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[1]In addition to this case the court below has decided *National Labor Relations Board v. Hazen et al.*, 203 F. 2d 807 (9th Cir., 1953).

tington, 9 Cal. App. 2d 445, 50 P. 2d 118 (1935); *In re Wong Yung Quy,* 2 Fed. 624 (C. C. D. Calif., 1880). A body and casket are intended for interment only and the shipping case, not intended for further use, has no value unless it be for scrap. Thus, nothing of commercial value is transported; nothing is intended for the channels of commerce. There is no interstate *business* occurring between petitioner and its clients.

In order to affect commerce, petitioner's activities would have to be related to the interstate movement of products, messages, or credits. A dead body is none of these, and petitioner is engaged solely with the preparation and burial of the dead.

Labor strife may have a decided impact upon ordinary business activity but death is controlled only by the immutable laws of nature. Regardless of labor strife or interpretations of the Act, people will continue to die and be buried.

It is submitted that the court below wholly failed to appreciate the basic question involved.

As the measure of interstate activity the Court counted all amounts received by petitioner for its locally performed mortuary, funeral and related services in those cases where out-of-state burial occurred. This unrealistic approach disregards the nature of the services rendered.

The component parts of the *"services"* rendered in connection with a dead human body are those normal *funeral services* performed in connection with the preparation of dead human remains for memorialization and interment. The shipping across state lines for interment adds nothing to the *services* performed.

Such services include, among other services:

(a) A minister, a rabbi, a priest, a reader, or some other religious representative.

The decision of the court below would thus hold that the *funeral sermon affects* interstate commerce.

(b) A soloist who may be accompanied by a pianist or organist.

The decision of the court below would thus hold that the singing of a religious hymn *affects* interstate commerce.

(c) A funeral ritual by the American Legion; the fraternal ceremonies of the Elks, the Masons, the Knights of Columbus, or the mass of the Catholic Church.

These are part of the *services* that the decision of the court below holds *affects* interstate commerce.

(d) The use of a church or chapel for the holding of the funeral ceremony.

Thus, the use of the church becomes a part of the *services* and *affects* interstate commerce according to the court below.

(e) The preparation of the dead human remains by embalming, restorative demisurgery, the use of cosmetics.

But these services are performed upon a dead human body in which there is no *property* and are, therefore, not in connection with a *product* which moves in interstate commerce.

To affect interstate commerce the funeral services performed, if they are to be in commerce, must be in con-

nection with a *product* which moves in interstate commerce. The *services* here involved are performed in connection with a dead human body in which courts have universally held there is no *property*. It would seem logically to follow, then, that if the dead human body is not *property*, it is not a *product*—if it is not a *product*, then in the shipping of the body across state lines, nothing of a commercial nature has moved in interstate commerce and the services in connection therewith can, under no stretch of the imagination, *affect* interstate commerce. Such services are truly local in character and on a par with other local activities such as those of lawyers, consultants, those practicting the healing arts, hotels, sanitariums and hospitals.

The fact that in a few of the cases, after petitioner has performed its local services, the body is interred in some other state is entirely incidental to the main activity.

But even if that were not so, the only items which could be considered in determining dollar volume of interstate activity are the shipping cases and possibly the caskets, which are transported solely for ultimate consumption in the interment of the dead human remains they contain.

Furthermore, the court below ignored the distinction between out-of-state and local clients of petitioner. In the case of a local client petitioner has no interstate contacts whatever. Surely, the fact that after petitioner has completed all its services for which it is compensated, the local client with petitioner's assistance makes a non-commercial shipment of the body for burial cannot convert all that has gone before into interstate commerce.

The court below has previously held location of the customer to be of vital importance in determining whether commerce is affected. *Cf. National Labor Relations Board v. Idaho Maryland Mines Corp.*, 98 F. 2d 129 (9th Cir., 1938) (customer located in same state as seller), with *Fox v. Summit King Mines,* 143 F. 2d 926 (9th Cir., 1944) (shipments to out-of-state customer). See also *McLeod v. Dilworth Co.,* 322 U. S. 327, 64 S. Ct. 1023 (1944), involving the constitutionality of a state taxing statute as applied to particular sales, which held that a sale made in Tennessee upon the request of an Arkansas customer was a transaction in interstate commerce and therefore not subject to the state taxing statute; it was the fact that the order came from an out-of-state customer which made the transaction one in interstate commerce.

This Court has clearly established that personal effort not related to production is not a subject of commerce and does not become so merely because of prior or subsequent interstate transportation. *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs,* 259 U. S. 200, 209, 42 S. Ct. 465, 466 (1922). In that case this Court held that the interstate movement of a major league baseball team to play its games was merely incidental to the exhibitions, and did not affect commerce. Shipment of a body to its final resting place, after local performance of all the various mortuary and funeral services by petitioner, is also merely an incidental activity. The decision of the court below conflicts in principle with the *Federal Baseball Club* case.

Petitioner notes the presence on the Supreme Court's docket of three cases involving professional baseball, ap-

parently calling for further consideration of the interstate commerce question: *Toolson v. New York Yankees, Inc.*, Docket No. 18; *Kowalski v. Chandler*, Docket No. 23; *Corbett v. Chandler*, Docket No. 25. Also pending is *Howell Chevrolet Company v. National Labor Relations Board*, Docket No. 34, which conflicts with *National Labor Relations Board v. Bill Daniels, Inc.*, 202 F. 2d 579 (6th Cir., 1953), on a question of interstate commerce under the National Labor Relations Act. Petitioner respectfully suggests to the Court that the instant case, when considered with such pending cases, will afford opportunity for a more comprehensive pronouncement on the interstate commerce questions involved.

The decision below also conflicts in principle with *Spears Free Clinic and Hospital v. Cleere*, 197 F. 2d 125, 126 (10th Cir., 1952), which was an action for damages under the Clayton Act for restraining the practice of chiropractic. Jurisdiction was sought on the basis of the travel of patients from out of state to the clinic for treatment. In dismissing, the court held that the practice of the healing arts is wholly local in character, and is not brought into commerce by the fact that patients come from out of state for treatment.

The decision below is also in conflict in principle with *Hart v. B. F. Keith Vaudeville Exchange*, 12 F. 2d 341, (2d Cir., 1926), and *Conley v. San Carlos Opera Co.*, 163 F. 2d 310 (2d Cir., 1947), also involving the Sherman Act. These cases held that the transportation of stage properties, apparatus, costumes, etc., across state lines and the travel of the performing artists was merely incidental to the essentially local nature of vaudeville.

Jurisdiction was based to some extent by the court below upon petitioner's having purchased supplies and capital equipment having its original source outside the state. The court below did not distinguish between amounts paid for supplies and for non-recurring purchases of capital equipment, nor did the court take into account the fact that the capital purchases for the 12 months' period in question were unusually large in petitioner's experience. It is hard to comprehend how labor difficulties between petitioner and its embalmers in its mortuary could affect petitioner's purchases of capital equipment and fixtures for its cemetery. It is of great practical importance to employers in many related fields for this court to decide to what extent, if any, dollar volume of purchases of a concern engaged in the local performance of professional services or other characteristically local activities, may be considered in determining whether its labor practices could have a substantial effect upon commerce.

There are a large number of cemeteries and mortuaries in the United States which will be affected by the decision of the court below. Undoubtedly, many of the mortuaries prepare bodies which are buried in other states. If the decision of the court below is allowed to stand, an entire new field of activity may be opened by the National Labor Relations Board and its jurisdiction may even be extended to such organizations as hospitals, clinics, and other professional and service organizations. This court should therefore grant certiorari in this case in the interest of authoritatively deciding whether it is proper for the Board to function in this field.

2. The Decision of the Court Below Is in Conflict With Decisions of This Court Regarding the Effect of Re-enactment of a Statute Upon Prior Administrative Interpretation and Practice Thereunder, and Will Have an Unsettling Effect Upon the Field of Administrative Law Unless Reviewed by This Court.

The record shows it to be undisputed to have been the consistent practice of the Board during the entire twelve-year existence of the Wagner Act, and for several years after its amendment by Taft-Hartley, to refuse to assert jurisdiction in cemetery and mortuary cases. Indeed, this practice was continued without interruption until 1951, when the Board decided in *Riverside Memorial Chapel, Inc.*, 92 NLRB 1594 that Riverside Memorial Chapel, Inc., a multi-state mortuary operation, was subject to the Act [R. 72-73]. While there are apparently no officially published rulings or decisions of the Board stating such policy, the fact is that there are many unpublished decisions of the Board, particularly those where action of the Regional Director in dismissing a petition for representation has been sustained on appeal to the Board in Washington.

If the record is not adequate on this point petitioner certainly should not be prejudiced by the improper denial by the Board and the court below of the opportunity to present evidence establishing such prior administrative practice. The Trial Examiner quashed subpoenas *duces tecum* by which petitioner expects to prove not only long failure of the Board to act in cemetery or mortuary cases, but its repeated refusals to assert jurisdiction.

The action of the court below is clearly in conflict with the following principles:

(a) The fact that powers have long been unexercised calls for close scrutiny as to whether such powers ever existed. *United States v. Morton Salt Co.,* 338 U. S. 632, 70 S. Ct. 357 (1950).

(b) Refusal or failure to assert jurisdiction for a long period of time is a fact to be considered in determining non-existence of jurisdictional power. *Federal Trade Commission v. Bunte Bros., Inc.,* 312 U. S. 349, 61 S. Ct. 580 (1941).

(c) Long-settled interpretation or practice of an agency under a statute attains the force of law upon a reenactment of the statute. *National Labor Relations Board v. Gullett Gin Co.,* 340 U. S. 361, 366, 71 S. Ct. 337, 340-341 (1951); *Helvering v. R. J. Reynolds Tobacco Co.,* 306 U. S. 110, 114-115, 59 S. Ct. 423, 425 (1939).

3. A Conflict in Principle Exists Between the Decision of the Court Below and Decisions of This and Other Courts of Appeal as to Whether Petitioner's Cessation of Activities Allegedly Affecting Commerce Deprived the Board of Such Jurisdiction as It May Have Had.

Although the court below apparently regarded the interstate movement of bodies for burial as the principal basis for the existence of jurisdiction, it held that it was immaterial that petitioner had stopped handling mortuary cases where the bodies were to be interred in some other state, and had substantially reduced its annual purchases from out-of-state sources. Decision of the court below is reported at 198 F. 2d 71 (9th Cir., 1952). The court supported its decision by citing *National Labor Relations*

Board v. Cleveland-Cliffs Iron Co., 133 F. 2d 295, 300 (6th Cir., 1943), and *Williams Motor Co. v. National Labor Relations Board,* 128 F. 2d 960, 963, 964 (8th Cir., 1942).

Such decision conflicts with *United Corp. v. Federal Trade Commission,* 110 F. 2d 473 (4th Cir., 1940); *United States ex rel. Sejnensky v. Tod,* 285 Fed. 523 (2d Cir., 1922); *cf. National Labor Relations Board v. Jones & Laughlin Steel Co.,* 331 U. S. 416, 428, 67 S. Ct. 1274, 1281 (1947); cf. *National Labor Relations Board v. Grace Co.,* 184 F. 2d 126, 130 (8th Cir. 1950), which hold that occurrence of subsequent events may operate to deprive an administrative agency of previously existing jurisdiction.

It is of widespread importance, both in the field of labor relations and in other areas of administrative law, to have this conflict resolved by this Court.

Conclusions.

It is respectfully urged for the reasons above stated, that (1), the Court of Appeals has so misconstrued the National Labor Relations Act in finding jurisdiction of the Board to exist, has so ignored the cited decisions of this court, and has so far departed from the accepted and usual course of judicial proceedings, in enforcing the Board's order and in failing to remand the case to the Board for further proceedings, and (2), such conflicts of law and such unanswered questions exist with regard to important points of federal law, as to call for an exercise of the power of supervision of this court.

Wherefore, petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to the end that the errors referred to may be corrected by this court.

Dated: October 22, 1953.

Respectfully submitted,

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APPENDIX.

National Labor Relations Act as Amended.

(Title 29, U. S. C. Sections 151 *et. seq.*)

"Section 1. Findings and declaration of policy. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or inter-

ruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"DEFINITIONS

"SECTION 2. When used in this Act—

* * * * * * * *

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but

shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * * * * * * *

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * * * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SECTION 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting

commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * * * * * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have

jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member agent, or agency shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the

district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

NATIONAL LABOR RELATIONS ACT.

(Wagner Act 49 Stat. 449.)

Section 2. Definitions

When used in this Act

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 438

FOREST LAWN MEMORIAL-PARK ASSOCIATION, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions of the court below, denying petitioner's motion for leave to adduce additional evidence and enforcing the order of the Board (R. 154-157, 173-174), are reported at 198 F. 2d 71 and 206 F. 2d 569. The findings of fact, conclusions of law, and order of the Board (R. 50-55, 31-48) are reported at 97 NLRB 309.

JURISDICTION

The decree of the court below (R. 158-164) was entered on September 16, 1953. The petition for a writ of certiorari was filed on October 26, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that petitioner's operations bring it within the coverage of the National Labor Relations Act, as amended.

2. Whether the circumstance that petitioner, after the entry of the Board's order against it, may have ceased or curtailed its interstate operations precluded enforcement of the order by the court below.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix to the petition, pp. 1-6, and the Appendix to this brief, *infra*, p. 11.

STATEMENT

I. The Board's findings and order

A. *The business of petitioner*—Petitioner is a nonstock, nonprofit cemetery association of lot owners in Forest Lawn Memorial-Park, a private cemetery in Glendale, California (R. 32-33; 19). Petitioner is engaged in the operation and maintenance of Forest Lawn and through 27 departments offers complete undertaking service and interment facilities (R. 33; 19, 22-23, 25-27). The mortuary department, involved here, has 58 em-

ployees, and for some years has handled more mortuary cases than any similar concern in Los Angeles County, except for two others (R. 33; 25-26).

During the twelve-month period ending April 30, 1951, petitioner provided mortuary services in 3,870 cases and received the sum of $4,621,803 for sales of property and supplies (including graves, crypts, and niches), interment charges, cremations, and other services (R. 33; 21). Of this amount, the sum of $53,572 was received for services and supplies furnished in connection with 114 bodies ultimately shipped for burial outside the State of California (R. 33-34; 22).[1] The charge made by petitioner for shipping cases accounted for $4,085 of this sum, charges for embalming and other services accounting for approximately $33,000 of the remainder, and charges for caskets the other $16,495 (R. 33-34; 22).

During the same period, petitioner purchased $1,242,244 worth of services, capital equipment, materials, and supplies, $40,452 of which was shipped directly to petitioner from outside the State of California and an additional $216,684 of which was manufactured or produced outside the State though purchased within the State (R. 52, n. 5; 20-21).

---

[1] In approximately 85 percent of these cases, the bodies were shipped outside the state within one week and, in most instances, petitioner made the appropriate arrangements with the carrier (R. 34: 23-24). Transportation charges of not less than $5,700, which in most instances were advanced by clients in the form of checks payable to the carriers, have not been included above (R. 34; 24).

Upon the foregoing facts, the Board found that petitioner was engaged in commerce within the meaning of the Act and that assertion of jurisdiction in this case would effectuate the policies of the Act (R. 34-36, 51-52).

B. *The unfair labor practices*—In March and April, 1951, during the course of a union organizing campaign, petitioner discharged four employees because of their membership in and activities on behalf of a union, interrogated employees with regard to union activity, accused employees of disloyalty to petitioner for attending union meetings and refusing to identify union adherents, told employees they must choose between loyalty to petitioner and loyalty to the union, and sought to induce an employee to continue with the union in an effort to disrupt it (R. 36-41). Upon these facts, not challenged here or in the court below, the Board found that petitioner had violated Section 8(a)(1) and (3) of the Act (R. 40-43, 51).

C. *The Board's order*—The Board's order (R. 53-55) requires petitioner to cease and desist from the unfair labor practices found and from in any other manner interfering with the rights guaranteed its employees under Section 7 of the Act. Affirmatively, the order requires petitioner to reinstate the four discharged employees with back pay and to post appropriate notices.

II. The decision of the court below

The court below sustained the Board's jurisdiction over petitioner and enforced the Board's order in full (R. 155-157). The court also rejected petitioner's contention, raised by motion for leave

to adduce additional evidence (R. 167-168), that even if petitioner was subject to the Act at the time of the entry of the Board's order, the order was not entitled to enforcement because subsequent to its entry petitioner had discontinued the interstate shipment of bodies and had reduced the volume of its out-of-state purchases (R. 173-174).

ARGUMENT

1. Petitioner's contention (Pet. 10-16) that the Board lacked jurisdiction is insubstantial and presents no question warranting review by this Court. As stated above, p. 3, petitioner in the course of its operations during the year ending April 30, 1951, purchased $40,452 worth of equipment, supplies and materials which were shipped directly to it from points outside the State of California and an additional $216,684 worth which were manufactured outside though purchased by petitioner within the State. These purchases alone suffice to sustain the Board's jurisdiction over petitioner.[2] Moreover, during the same period petitioner received $53,572 for services and supplies, including over $20,000 worth of caskets and shipping cases, furnished in connection with bodies shipped outside the State of California (*supra*, p. 3). Taken together, these facts, as the Board and the court below held, plainly place petitioner within the coverage of the Act. *National Labor Relations Board*

[2] The contention (Pet. 16) that the court below failed to take into account that approximately half of these purchases were "non-recurring purchases of capital equipment" does not advance petitioners' case. For, even if such purchases are eliminated, petitioner's remaining purchases of supplies and materials which come from outside California are sufficiently substantial to sustain the Board's jurisdiction.

v. *Denver Building & Construction Trades Council,* 341 U. S. 675, 683-685; *Local 74, United Brotherhood of Carpenters & Joiners* v. *National Labor Relations Board,* 341 U. S. 707, 712; *International Brotherhood of Electrical Workers* v. *National Labor Relations Board,* 341 U. S. 694, 699. See, also, *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 604-609; *Polish National Alliance* v. *National Labor Relations Board,* 322 U. S. 643, 647-648.

The court below properly rejected the contention (Pet. 17-18) that the Board is precluded from asserting jurisdiction over petitioner because of its failure to assert jurisdiction over similar enterprises prior to the 1947 amendments to the Act. Failure to exercise power does not extinguish it. *United States* v. *Morton Salt Co.,* 338 U. S. 632, 647-648; *Federal Trade Commission* v. *Bunte Brothers, Inc.,* 312 U. S. 349, 352. Further, as noted by the court below (R. 157), there is no "suggestion in the legislative history of the Act as amended tending in any way to support the view that Congress intended to exclude mortuaries from the sweep of the Act:"[3] The definitions of the terms "commerce" and "affecting commerce" set

[3] This is not a case like *National Labor Relations Board* v. *Gullett Gin Company, Inc.,* 340 U. S. 361, 365-366, cited by petitioner, where this Court noted that Congress had specifically considered a Board practice, set forth in Board decisions and sustained by the courts, and by clear implication had ratified it. *Helvering* v. *R. J. Reynolds Tobacco Company,* 306 U. S. 110, 116-117, also cited by petitioner, is similarly inapposite. In that case, Treasury Regulations, issued pursuant to statutory rule-making powers, were approved by Congress through reenactment of the statutory language as interpreted by the Regulations.

forth in Section 2(6) and (7) of the Act and the Board's authority under Section 10 to prevent unfair labor practices "affecting commerce" remain unchanged in all material respects in the amended Act. This reenactment confirmed the intention of Congress to confer upon the Board power to prevent unfair labor practices which "affect commerce when judged by the full reach of the constitutional power of Congress." *Polish National Alliance* v. *National Labor Relations Board,* 322 U. S. 643, 648. Of course, under the original Act, as under the amended Act, the Board had wide discretion in asserting its legal jurisdiction and often declined to exercise it on grounds of policy, or for budgetary or other reasons. See *National Labor Relations Board* v. *Denver Building & Construction Trades Council,* 341 U. S. 675, 684; *National Labor Relations Board* v. *Indiana & Michigan Electric Co.,* 318 U. S. 9, 18. And in this very case, the Board pointed out that petitioner's operations met the standards, promulgated in 1950, by which the Board is guided in determining whether to exert its power (R. 52). This practice was recognized and approved by Congress, but, as the court noted in *Haleston Drug Stores* v. *National Labor Relations Board,* 187 F. 2d 418, 422 (C. A. 9), certiorari denied, 342 U. S. 815, "Nothing was added to the section [10] suggestive of an intent on the part of Congress to circumscribe or curtail the Board's authority in respect of the prevention of such practices, or to render less flexible the unfair labor practice provisions of the original act."

2. There is no merit in petitioner's further con-

tention, raised by motion for leave to adduce additional evidence, that the Board's order was not entitled to enforcement because, subsequent to the entry of the order, petitioner assertedly curtailed or discontinued its interstate operations (R. 167-168, 173-174). Under Section 10(a) and (c) of the Act the Board on finding that a person "has engaged in or is engaging in" an unfair labor practice "affecting commerce" is required to issue a cease and desist order to prevent further unfair labor practices; in addition, the Board is expressly authorized to undo, as far as possible, the consequences of past violations by requiring an offending employer "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The statutory language precludes the contention that an employer may escape the consequences of his unfair labor practices by the expedient of withdrawing from interstate commerce or even discontinuing his business operations after the Board has issued its order. *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. 2d 295, 300 (C. A. 6); *National Labor Relations Board* v. *Acme Mattress Co., Inc.*, 192 F. 2d 524, 528 (C. A. 7); *National Labor Relations Board* v. *Dixon*, 184 F. 2d 521, 522-523 (C. A. 8); cf. *National Labor Relations Board* v. *Pool Mfg. Co.*, 339 U. S. 577, 581-582 (an order "made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made"); *National Labor Relations Board* v.

Crompton Highland Mills, 337 U. S. 217, 225, n. 7; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 271.[4]

The decision of the court below does not conflict with the decision of the Court of Appeals for the Fourth Circuit in *United Corp.* v. *Federal Trade Commission,* 110 F. 2d 473, cited by petitioner. There, as the court pointed out (at p. 476), the Commission did not, as the governing statute required, have jurisdiction over the party against whom its order was directed as of the date the order issued. Nor is this a case like *National Labor Relations Board* v. *Grace Co.,* 184 F. 2d 126 (C. A. 8), also cited by petitioner, where the court indicated it would not enforce a Board order requiring an employer to bargain with a union if it were shown that after the order issued the employer had closed its plant permanently, thereby rendering the Board's order impossible of fulfilment and of no benefit to the employees. 184 F. 2d at 130.[5] Here petitioner is still in existence and there is no impediment to carrying out the provisions of the order. Also inapposite is *United States ex rel. Sejnensky* v. *Tod,* 285 Fed. 523 (C. A. 2), where immigration authorities were barred from carrying out a deportation order directed

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[4] Of course, as the court below pointed out (R. 174), the Board order as enforced, insofar as it is prospective in effect, interdicts only such future acts as affect interstate commerce, and in any future contempt proceedings under the decree "It would then be a complete defense to show that the acts did not affect interstate commerce."

[5] The court expressly distinguished that situation from cases "in which although, after the Board's order, the employer has gone out of business, the order is in part possible of enforcement * * *." 184 F. 2d at 131.

against a person who, although an alien at the time of the issuance of the order, had become a citizen before its execution. There, as the court pointed out (p. 526), "the immigration authorities [had] lost all power over her and [were] without authority to deport her." Here, although the Board may not have the power to entertain future unfair labor practice charges against petitioner if the latter's operations no longer affect commerce, the Board, as we have stated, has not lost its power under the statute to remedy past unfair labor practices committed by petitioner which affected commerce within the meaning of the Act.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DECEMBER, 1953.

APPENDIX

Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), provides in pertinent part as follows:

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employes with or without back pay, as will effectuate the policies of this Act: * * *

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In the

United States Supreme Court

October Term 1953

No. 439

FOREST LAWN MEMORIAL-PARK ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF OF NATIONAL FUNERAL DIRECTORS ASSOCIATION OF THE UNITED STATES, INC., AS AMICUS CURIAE

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In the

UNITED STATES SUPREME COURT

October Term 1953

No. 438

FOREST LAWN MEMORIAL-PARK ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF OF NATIONAL FUNERAL DIRECTORS ASSOCIATION OF THE UNITED STATES, INC. AS AMICUS CURIAE

National Funeral Directors Association of the United States, Inc., a non-profit corporation, which is composed of more than twelve thousand independent Funeral Directors located in all forty-eight States of the Nation, and in Alaska, Hawaii and Puerto Rico, is filing this Brief with the consent of the Petitioner and the Respondent.

QUESTIONS PRESENTED

The question presented, to which this Amicus Curiae desires to direct this Brief is — "Does the Petitioner come within the provisions of the National Labor Relations Act as amended, insofar as Interstate Commerce is concerned?"

1. SUMMARY OF FACTS PERTAINING TO THE JURISDICTIONAL ISSUE.

The facts are well set out in the Petition for a Writ of Certiorari filed by the Petitioner herein.

2. WHY THE WRIT OF CERTIORARI SHOULD BE ALLOWED.

A. The shipping of bodies outside the State of California does not constitute "Interstate Commerce" within the meaning of the Act.

(1) The responsibility for and jurisdiction of the body ceases when the remains are delivered to the baggage agent of the carrier; consequently the Funeral Director performs no act in "Interstate Commerce."

(2) A dead human body does not constitute "property" in the normal sense of the word when we are thinking in terms of Interstate Commerce.

For hundreds of years, since the beginning of what we now know as Modern Law, it has been held that a dead human body is not "property" in any sense of the word.

In re *Wong Yung Quy on Habeas Corpus,* a case reported in *2 Fed. 624* it was held:

> "A corpse is not property, and the remains of human beings carried out of the State for burial in a foreign country are not exports within the meaning of the clause of the Constitution prohibiting the laying of imposts or duties by the State upon exports."

It was thus determined that a dead human body with its casket cannot be considered as property being exported, even when it is being carried outside the State.

In the case of *A. F. Hutchinson Land Company* v. *Whitehead Bros. Co.*, 217 N.Y.S. 413, 418, 127 Misc. 558, it was held:

> "There is no right of property in a dead body in the ordinary sense, but it is regarded as property so far as necessary to entitle next of kin to legal protection from violation or invasion of its place of burial."

See also *Northeast Coal Co* v. *Pickelsimer*, 68 S.W. 2d 760, 253 Ky. 11.

A dead body is not part of the assets of the estate.

O'Donnell v. *Slack*, 123 Cal. 285;
Enos v. *Snyder*, 131 Cal. 68, 63 P. 170;
Griffith v. *Charlotte, etc. R. Co.*, 23 S.C. 25.

It is not subject to replevin.

Keyes v. *Konkel*, 119 Mich. 550, 78 N.W. 649;
Buchanan v. *Buchanan*, 28 Misc. 261, 59 N.Y. Supp 810.

It is not property in a sense that will support discovery proceedings.

Danahy v. *Kellogg*, 70 Misc. 25, 126 N.Y. Supp 444.

It may not be held as security for funeral costs.

Jefferson County Burial Society v. *Scott*, 218 Ala. 354, 118 So. 644;
American Express Co. v. *Eppley*, 5 Ohio Dec. (Rep.) 337;
See also
Jones v. *Ashburnham*, 4 East 455, 102 Eng. Rep. 905;

Reg. v. *Fox,* 2 Ad. & El. (N.S.) 246, 114 Eng. Rep. 95;
Reg. v. *Scott,* 2 Q. B. 248, note b, 114 Eng. Rep. 97.

It cannot be withheld by an express company or returned to the sender, where shipped under a contract calling for cash on delivery.

American Express Co. v. *Eppley,* supra;
Pacific Exp. Co. v. *Gathwright,* 61 Tex. Civ. App. 587, 130 S.W. 1035.

It may not be the subject of a gift causa mortis.
Driscoll v. *Nicholls,* 71 Mass. 488.

It is not common law larceny to steal a corpse.

Toppin v. *Moriarty,* 59 N.J. Eq. 115, 44 Atl. 469;
Fox v. *Gordon,* (Pa.) 16 Phila. 185;
Hayne's Case, 12 Coke 113, 77 Eng. Rep. 1389.

Rights in a dead body exist ordinarily only for purposes of burial, and, except with statutory authorization, for no other purpose.

Southern Life & Health Ins. Co. v. *Morgan,* 21 Ala. App. 5, 105 So. 161;
Matter of Beekman St. (N.Y.), 4 Bradf. Surr. 503;
Long v. *Chicago, etc R. Co.,* 15 Okla. 512, 86 P. 289.

Since dead bodies do not constitute "property," the question might arise concerning the casket, clothing or other tangible items incident to the burial.

Funeral Directing is not a commercial business in the ordinary sense of the word; neither is the Funeral Director a "supplier." He solely renders a service. He can be

likened to the doctor, lawyer, dentist. The tangible items he uses in his profession are but incidental to the service he renders.

In the case of *Guthrie* v. *Weaver,* 1 Mo. App. 136, it was held that:

> "A coffin which, with the consent of all persons having any pecuniary interest therein, had been deposited in a grave for purposes of interment with a corpse enclosed within it, is no longer a subject of property."

Thus, when a Funeral Director administers embalming fluid to a dead body, or supplies it with a suit of clothes or a shroud, these are rendered in connection with the Funeral Director's professional services.

We thus respectfully contend that the Petitioner is not engaged in "interstate commerce" because he does not ship anything outside the State which can be legally claimed as "property," and even though it should be held that a dead human body and casket are "property" then the control and custody of the shipment ceases when the same have been delivered to the baggage agent of the carrier.

3. FUNERAL DIRECTORS AND EMBALMERS ARE "PROFESSIONAL MEN."

As "professional men" Funeral Directors and embalmers are exempt under the National Labor Relations Act as amended. *Title 29 F.C.A. par 152 (12)* of this Act provides as follows:

> "The term "professional employee" means — (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechani-

cal, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standarized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

Practically every State of the Union, including California, has a license law governing Funeral Directors and Embalmers which laws were placed on the books primarily to protect the public and to raise the standards and ethics of the Funeral Director and Embalmer.

These laws, many of which were drawn under the supervision of the General Counsel of National Funeral Directors Association of the United States, Inc., are patterned after the various State laws governing lawyers, doctors and dentists. They require extended courses of study, examination and licensing. Thus the California Law known as "The Funeral Directors and Embalmers Law, Business and Professions Code of Deering's California Codes," Article 1, § 7600 et seq. provides that the ap-

plicant for a Funeral Director's license, must be over twenty-one years of age, of good moral character and must be examined, and successfully pass the examination on —

1. Signs of death
2. Manner of determining death
3. Laws governing preparation, burial and disposal of dead human bodies and shipment thereof
4. Local health laws and regulations.
(see paragraph 7622)

The conduct of his business is specifically regulated by rules and regulations promulgated by the State Board of Funeral Directors and Embalmers.

Embalmers are separately licensed. (Par. 7640.) Paragraph 7643 provides that the applicant for embalmer's license must:

1. Be over 21 years of age.
2. Of good moral character.
3. Furnish proof of completion of high school course or that he has been licensed and has practiced as an embalmer for three of the last seven years in another State or County and that such license was never suspended or revoked for unethical conduct.
4. Have completed two years apprenticeship under licensed embalmer in this State and practiced as such in an approved funeral establishment and assisted in the embalming of 100 human dead bodies; provided that one who has practiced embalming three of the last seven years in another State or county and never had license suspended or revoked shall serve only one year apprenticeship and shall have assisted in the embalming of 50 dead human bodies.

5. Complete course of nine months in approved embalming school on subjects set out in § 7646.

The subjects of examination are set forth in § 7646, which are as follows:

1 - Theory of embalming
2 - Anatomy, histology, embryology and dissection
3 - Pathology and bacteriology
4 - Hygiene, sanitation, health
5 - Chemistry, toxicology
6 - Restorative art
7 - Health laws and rules

Apprentice embalmers must, according to paragraph 7662 —

1 - Be over 18 years of age
2 - Of good character
3 - Furnish proof of high school completion *or* that he has practiced as an embalmer for three of last seven years in other state or county and his license was never revoked or suspended.

The Board may suspend or revoke licenses of Funeral Directors and Embalmers and apprentices after hearing. The stringency of this supervision is illustrated under Paragraph 7668 which provides as follows:

> "The Board may suspend or revoke certificate of apprenticeship when apprentice is found guilty after hearing, for the following acts or omissions:

a. Failure to devote full time to apprenticeship.
b. Failure to make reports as required to Board.
c. Absence from duty unauthorized.
d. Gross immorality.
e. On duty under influence of liquor.
f. Disobedience of orders of superior.

g. Violation of law or regulations of Board.
h. Soliciting business for funeral director or embalmer.
i. Fraud or misrepresentation.
j. Failure to pay fee.

Thus, in the eyes of the laws of California and the other States having licensing laws, and under *Title 29 F.C.A. paragraph 151 (12),* Funeral Directors and Embalmers assume the status of "professional men."

4. THE QUESTION OF WHETHER A FUNERAL DIRECTOR IS OR IS NOT IN "INTERSTATE COMMERCE" HAS BEEN DECIDED IN CASES OTHER THAN N.L.R.B. CASES.

A. Thus, under the *Motor Carrier Act of 1935 as Amended. Title 49 F.C.A., par. 301 et seq.,* it was held in 1938, *In the Matter of Maurice E. Newman of Dover, Delaware, Docket MC 18962,* by the Interstate Commerce Commission after a thorough hearing, that the Funeral Director was not engaged in Interstate Commerce, and this notwithstanding the fact that a substantial part of his equipment, caskets and fluids had been purchased outside the State of Delaware, and that about three percent of his visits in carrying on his business as a Funeral Director brought him into another State. See also case of *Union Funeral Service of Gillespie, Illinois, I. C. No. M C 67243.*

B. *Federal Wage and Hour Law.*
(Fair Labor Standards Act)
Title 29 F.C.A. Chapter 8, par 201 et seq.

Under this Act the Funeral Director is exempt as a Service Establishment, the greater part of whose selling or servicing is in intrastate commerce.

Title 29, par. 213 Exemptions (a) provides in part as follows:

> "The provisions of Sections 6 and 7 (pars. 206, 207 of this title) shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

C -*The Social Security Act as amended, Title 42, par. 411 (c) (5)* excludes self employed funeral directors, placing them in the same category as physicians, lawyers, dentists and other professional men.

Title 42 F.C.A. par 411, Self-Employment (c) Trade or Business.

> "The term "trade or business", when used with reference to self-employment income or net earnings from self-employment, shall have the same meaning as when used in Section 23 of the Internal Revenue Code (26:23) except that such term shall not include —
>
> (1) The performance of the functions of a public office;
>
> (2) The performance of service by an individual as an employee (other than service described in Section 210 (a) (16) (B) [par. 410 (a) (16) (B) of this title] performed by an individual who has attained the age of eighteen;)
>
> (3) The performance of service by an individual as an employee or employee representative as defined in Section 1532 of the Internal Revenue Code (26:1532);

(4) The performance of service by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(5) The performance of service by an individual in the exercise of his profession as a physician, lawyer, dentist, osteopath, veterinarian, chiropractor, naturopath, optometrist, Christian Science practitioner, architect, certified public accountant, accountant registered or licensed as an accountant under State or Municipal law, full-time practicing public accountant, funeral director, or professional engineer; or the performance of such service by a partnership.

During the writer's more than forty years practice of the law — and particularly as United States Attorney for the Southern District of Ohio under the Wilson Administration — we saw attempts by various governmental agencies in the administrative or executive branch, to extend their jurisdiction by amending by regulation or rule, the statutes under which they operated, yet never have we seen such an attempt as the National Labor Relations Board has been making during the past few years, even though, as stated above, every other governmental agency has held the average funeral director to be not engaged in interstate commerce — and this, even though in a case before the Interstate Commerce Commission, a part of the actual funeral service rendered, went across a state line into another State.

Not only is the National Labor Relations Board, in our opinion, attempting to improperly extend its jurisdiction by arbitrary rulings and formulae, but they are going counter to every other governmental agency and therefore,

every Act of Congress under which these other governmental bodies operate. As an example, take the Fair Labor Standards Act, which expressly exempts retail and service establishments under certain conditions. The funeral director is admittedly in the Service branch of endeavor.

In a very recent situation this Court held that professional baseball was still a sport and not a business even though it admittedly was in interstate commerce. We mention this because in our situation the National Labor Relations Board, in its attempt to obtain jurisdiction over another line of endeavor, is not only making Interstate out of Intrastate, but is endeavoring to take Funeral Services out of the service category.

As a matter of fact, if the average funeral director is subject to the jurisdiction of the National Labor Relations Board, then in our opinion, every corner drugstore and small retail establishment, every barber shop and other service enterprise, in fact, everybody is engaged in interstate commerce and should be subject to the supervision of the National Labor Relations Board. This I do not believe was ever intended by Congress or it would not have passed the laws creating the Federal Trade Commission, the Interstate Commerce Commission, the Wage and Hour Division, and others.

5. CONCLUSION

It is respectfully submitted for the reasons above set forth that the Court of Appeals has wrongfully held that the National Labor Relations Board had jurisdiction in this case, and its decision is of such far-reaching consequence that the Writ should be granted and that this Honorable

Court may once and for all time properly define the status of a Funeral Director and Embalmer insofar as the National Labor Relations Act is concerned.

Dated January 4, 1954.

Respectfully submitted,

JAMES R. CLARK,
General Counsel for National Funeral Directors Association of the United States, Inc.

BURTON E. ROBINSON, on the Brief.

PETITION FOR A WRIT OF CERTIORARI

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FILED
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IN THE

Supreme Court of the United States

October Term, 1953.
No. 479

PIERCE BROTHERS,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1953.

No. .....

PIERCE BROTHERS,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Pierce Brothers prays that a Writ of Certiorari issue to review the decree of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on September 16, 1953, and respectfully shows:

Opinions Below.

Decision and Order of the National Labor Relations Board [R. 59] are reported at 97 N.L.R.B. 317 (1951). The opinion of the Court of Appeals [R. 198] is officially reported at 206 F.2d 569 (9th Cir. 1953).

Jurisdictional Statement.

The statute believed to sustain the jurisdiction of this Court is Section 1254 of Title 28 of the United States Code.

Question Presented.

Did petitioner engage in labor activities affecting commerce within the meaning of the Act or within the meaning of the Commerce Clause of the United States Constitution?

Statute Involved.

The statute, the proper application of which is involved, is the National Labor Relations Act as amended (Sections 151 *et seq.* of Title 29, United States Code), which confers power upon the National Labor Relations Board to prevent persons from engaging in unfair labor practices affecting commerce. Pertinent provisions of the Act are set forth in the Appendix.

Summary Statement of the Case.

1. Summary of Procedure Below.

Petitioner seeks review of a decree of the United States Court of Appeals for the Ninth Circuit filed September 16, 1953, enforcing an order of the National Labor Relations Board directing petitioner to take certain action regarding the alleged commission of certain unfair labor practices by petitioner [R. 201].

After filing by the Union of an unfair labor practice charge against petitioner [R. 1], the Board issued its complaint based thereon (Case No. 21-CA-1078) [R. 4],

and a hearing before a Trial Examiner of the Board was conducted [R. 64]. Facts bearing on the interstate commerce question were stipulated by counsel and admitted in evidence [R. 11, 69].

Then petitioner moved for a dismissal of the complaint for lack of jurisdiction on the ground that it was not engaged in commerce within the meaning of the National Labor Relations Act, and that none of its labor practices could affect commerce within the meaning of the Act. The Trial Examiner reserved decision on this motion and petitioner withdrew from the hearing, preferring to rest its entire defense upon what it regarded as a clear-cut lack of jurisdiction of the subject matter [R. 70-71].

After the hearing the Trial Examiner issued his Intermediate Report denying petitioner's motion to dismiss [R. 22] and finding that petitioner had committed unfair labor practices affecting commerce within the meaning of the Act [R. 29-31].

The Board adopted the Trial Examiner's finding in its decision and order [R. 59] and subsequently petitioned the Court of Appeals for the Ninth Circuit for enforcement of its order [R. 187].

Following the receipt of briefs and hearing of oral argument on the jurisdictional issue, the Court of Appeals entered its decree on September 16, 1953, enforcing the Board's order [R. 201].

On application of petitioner issuance of mandate has been stayed by such court pending the filing of this petition on or before November 26, 1953, such date to be continued pending the final disposition of the case by the Supreme Court of the United States.

2. Summary of Facts Pertaining to the Jurisdictional Issue.

Petitioner is a California corporation engaged since 1902 in the undertaking business in Los Angeles County. Because of the geography of Metropolitan Los Angeles and the localized nature of mortuary activities it operates 15 mortuaries in such county, all but one within a radius of 15 miles of the main office.

In the 12 months' period ending on March 31, 1951, Pierce Brothers purchased capital equipment, materials, and supplies of a value of approximately $590,000.00. Of this total amount approximately $7,500.00 worth in value was shipped to petitioner directly from out of state and $45,000.00 worth, while purchased locally, originated outside the state. That is, there was less than 1.3% of direct "inflow" and less than 8% of indirect "inflow" [R. 13].

In such 12 months' period petitioner handled 5,780 cases from which it received approximately $1,900,000 [R. 13]. In 722 of such cases either the bodies (544 cases) or the cremated remains (178 cases) were ultimately shipped out of California. In many of such cases the bodies were transported to vaults in local cemeteries or the cremated remains were held at Pierce Brothers Crematorium, a wholly owned subsidiary, for days, weeks, and even months pending a decision by the family as to where in the State of California or elsewhere the remains should be interred [R. 15, 16].

In connection with most of these 722 cases, petitioner furnished all of its customary services including the following: making the first call to the home or hospital, picking up the body and removing it to Pierce Brothers' nearest mortuary; embalming, dressing, performing cosmetic work, and otherwise preparing the body for burial; placing

and maintaining the body in a reposing room; publishing the obituary notice; preparing and executing the death certificate, and obtaining the attending doctor's signature thereto; obtaining the interment or removal and other required state and local government permits; furnishing the chapel and conducting the service (including arrangement of flowers, furnishing organist, soloist, altar, and other accoutrements for all faiths, funeral director and attendants); transporting the family; furnishing acknowledgment cards and giving comfort, counsel and advice [R. 14, 15].

The only additional service performed where remains were to be shipped, either within the state or out of state, was the furnishing of a shipping case (for bodies) or box (for ashes) and the making of arrangements with the carrier. Petitioner made no additional charge for such arrangement [R. 15]. Where a decision is made to have the remains shipped elsewhere Pierce Brothers instructs its employees to obtain from the client an authorization and direction for shipment, making Pierce Brothers the agent for the client as consignor. Pierce Brothers' employees followed instructions and obtained such a form [R. 19] in approximately one-half of the cases handled [R. 15].

Of the cases in which the remains were moved to other states only 121 were handled for out-of-state clients. These paid only $4,604.40 for shipping cases and shipping boxes and $5,220.00 for caskets, and $13,349.55 for the usual locally performed mortuary and crematory services. Thus receipts from caskets and shipping cases and boxes in such cases totalled only $9,824.40, or five-tenths of one per cent (.005) of the total receipts for the year ($1,900,000.00) [R. 13, 20].

Local clients by or for whom the remaining out-of-state shipments of remains were made, paid $23,830.00 for shipping cases and boxes and $68,287.56 for caskets which were shipped, and $180,727.59 for the usual locally performed mortuary and crematory services [R. 13, 20].

In many of these instances caskets were furnished before any decision regarding shipment was reached by the family [R. 15] The furnishing of a casket is standard procedure in all cases, whether interment is to be local or otherwise [R. 14].

In over 99% of the cases handled annually by petitioner the person died or was buried in Los Angeles County. In over 95% of the cases handled annually the deceased died and/or the client lived within fifteen miles of the particular mortuary handling the case [R. 13].

Petitioner owns 97% of the capital stock of Pierce Insurance Company, a California corporation engaged in the funeral service insurance business. Such company is an independent business, with separate officers who have independent power to determine employment and personnel policies and procedures. Such company's insurance is handled by a large number of independent mortuaries and sold by employees thereof and of petitioner. Pierce Insurance Company is licensed to do business in a number of states and in Hawaii, doing over $25,000.00 worth of business in California, Missouri and Washington in 1950, and over $20,000.00 in Hawaii in 1950 [R. 16-18].

Specification of Errors.

The Court of Appeals erred:

(1) In holding that petitioner engaged in labor activities affecting commerce within the meaning of the Act.

(2) In holding that reenactment of the Labor Act did not give the force of law to prior Board policy of refusing to assert jurisdiction over mortuaries.

(3) In failing to remand the proceeding to the Board for the receipt of evidence establishing the Board's prior practice with regard to mortuary cases.

(4) In failing to hold that reversal by the Board of its long-standing rule of hearing cases involving mortuaries amounted to the issuance of a rule of general policy required by the Administrative Procedure Act to have been published in the Federal Register.

(5) In failing to find that Congress intended that mortuaries are and should remain beyond the jurisdiction of the Board.

(6) In enforcing the Board's order.

Reason Relied on for Allowance of the Writ.

In view of the large number of mortuaries and other organizations performing local professional services, it is of national importance for this Court to decide whether labor activities of such organizations affect commerce within the meaning of the National Labor Relations Act or the Constitution.

The Court of Appeals for the Ninth Circuit is the only federal court having decided whether the labor practices of a mortuary could affect commerce within the meaning of the Act or Constitution.[1] Due to the fact that such activities are not commercial and do not involve production in the ordinary sense but partake of a professional nature, and considering the large number of organizations similar to petitioner which are affected by the decision below, this important question calls for final decision by the United States Supreme Court.

1. Interstate Movement of Human Remains.

Jurisdiction was based in large part by the court below upon the fact that in a small percentage of the mortuary cases handled by petitioner, the human remains, after petitioner had perform all its services, were taken outside the state for burial. This result was reached even though under petitioner's prescribed procedure it is the clients who are consignors and petitioner acts only as their agent.

In such a case no transportation of *goods* in the accepted sense takes place. A dead body or its ashes is not a commodity. It is not even property in the usual sense. *Gray v. Southern Pacific Co.*, 21 Cal. App. 2d 240, 68 P. 2d 1011 (1937); *Steen v. Whittington*, 9 Cal. App. 2d 445, 50 P.2d 118 (1935); *In re Wong Yung Quy*, 2 Fed. 624 (C.C.D. Calif. 1880) (holding that remains of deceased persons are not exports as the term is used in Article I, Section 10(2) of the United States Constitution). A

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[1]In addition to this case and its companion case, *National Labor Relations Board v. Forest Lawn Memorial-Park Association, Inc.*, the court below has decided *National Labor Relations Board v. Hazen, et al.*, 203 F.2d 807 (9th Cir. 1953).

body and casket are intended for interment only and the shipping case, not intended for further use, has no value unless it be for scrap. Thus, nothing of commercial value is transported; nothing is intended for the channels of commerce. There is no interstate *business* occurring between petitioner and its clients.

In order to affect commerce, petitioner's activities would have to be related to the interstate movement of products, messages, or credits. A dead body or cremated remains is none of these, and petitioner is engaged solely with the preparation of the dead for burial.

Labor strife may have a decided impact upon ordinary business activity but death is controlled only by the immutable laws of nature. Regardless of labor strife or interpretations of the Act, people will continue to die and be buried.

It is submitted that the court below wholly failed to appreciate the basic question involved.

2. Measurement of Interstate Activity.

As the measure of interstate activity the court below and the Board counted all amounts received by petitioner for its locally performed mortuary, funeral and related services in those cases where out-of-state burial occurred. This unrealistic approach disregards the nature of the services rendered. Preparation of dead human remains is accomplished for purposes of dignified, reverent burial; funeral services include such utterly uncommercial activities as the preaching of sermons, singing of hymns, conduct of church services and care of the bereaved. None of these services has the remotest connection with products which are to move in commerce. Such services are

truly local in character and on a par with other local activities such as those of lawyers, consultants, those practicing the healing arts, hotels, sanitariums and hospitals.

The fact that in some of the cases after petitioner has performed its local services the body is interred in some other state is entirely incidental to the main activity.

But even if that were not so, the only items which properly could be considered in determining dollar volume of interstate activity are the shipping cases and possibly the caskets, although the caskets are transported solely for ultimate consumption in the interment of the dead human remains they contain. Any yardstick based on locally performed personal services rendered "in connection with" the sale of such items would be a vague and shifting standard incapable of just application.

3. The Distinction Between Local and Out-of-State Clients.

Furthermore, the court below ignored the distinction between out-of-state and local clients of petitioner. In the case of a local client petitioner has no interstate contacts whatever. Surely, the fact that after petitioner has completed all its services for which it is compensated, the local client with petitioner's assistance makes a non-commercial shipment of the body for burial cannot convert all that has gone before into interstate commerce.

The court below has previously held location of the customer to be of vital importance in determining whether commerce is affected. Cf. *National Labor Relations Board v. Idaho Maryland Mines Corp.*, 98 F.2d 129 (9th Cir. 1938) (customer located in same state as seller) with *Fox v. Summit King Mines*, 143 F.2d 926 (9th Cir. 1944) (shipments to out-of-state customer); see also

McLeod v. Dilworth Co., 332 U. S. 327, 64 S.Ct. 1023 (1944), involving the constitutionality of a state taxing statute as applied to particular sales, which held that a sale made in Tennessee upon the request of an Arkansas customer was a transaction in interstate commerce and therefore not subject to the state taxing statute; it was the fact that the order came from an out-of-state customer which made the transaction one in interstate commerce.

4. The Baseball Case and Similar Cases.

This Court has clearly established that personal effort not related to production is not a subject of commerce and does not become so merely because of prior or subsequent interstate transportation. *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 42 S.Ct. 465 (1922). In that case this Court held that the interstate movement of a major league baseball team to play its games was merely incidental to the exhibitions, and did not affect commerce. Shipment of a body to its final resting place, after local performance of all the various mortuary and funeral services by petitioner, is also merely an incidental activity. The decision of the court below conflicts in principle with the *Federal Baseball Club* case.

The decision below also conflicts in principle with *Spears Free Clinic and Hospital v. Cleere*, 197 F.2d 125, 126 (10th Cir. 1952), which was an action for damages under the Clayton Act for restraining the practice of chiropractic. Jurisdiction was sought on the basis of the travel of patients from out of state to the clinic for treatment. In dismissing, the court held that the practice of the healing arts is wholly local in character, and is not

brought into commerce by the facts that patients come from out of state for treatment.

The decision below is also in conflict in principle with *Hart v. B. F. Keith Vaudeville Exchange,* 12 F.2d 341 (2d Cir. 1926), and *Conley v. San Carlos Opera Co.,* 163 F.2d 310 (2d Cir. 1947), also involving the Sherman Act. These cases held that the transportation of stage properties, apparatus, costumes, etc., across state lines and the travel of the performing artists was merely incidental to the essentially local nature of vaudeville.

5. Purchases Originating Out of State.

Jurisdiction was based to some extent by the court below upon petitioner's having purchased relatively small amounts of supplies and capital equipment having its original source outside the state.

It is of great practical importance to employers in many related fields for this Court to decide to what extent, if any, dollar volume of purchases, direct or indirect, of a concern engaged in the local performance of professional services or other characteristically local activities, may be considered in determining whether its labor practices could have a substantial effect upon commerce.

6. Significance of National Labor Relations Board History Under Wagner Act.

Of great significance in determining the existence or non-existence of jurisdiction in this case is the fact that during the entire twelve-year period of the Wagner Act, and for several years after its reenactment, with amendments, by the Taft-Hartley Act there were no published rulings, interpretations or decisions to which the

Labor Board had ever asserted jurisdiction in mortuary cases. The court below [R. 200] dismissed this history as a "mere failure to assert jurisdiction." In view of the many decisions of the Board which are unpublished, particularly those where action of a Regional Director in dismissing a petition for representation is sustained on appeal to the Board in Washington, the more reasonable inference is that all during the existence of the Wagner Act the Board followed a uniform practice of *refusing* to assert jurisdiction over mortuaries.

It is true of course that since 1951 the Board has asserted jurisdiction over mortuaries in this and other cases. *Riverside Memorial Chapel, Inc.*, 92 N.L.R.B. 1594 (1951) (involving a multi-state mortuary operation); *Hazen & Jaeger Funeral Home*, 95 N.L.R.B. 1034 (1951), enforced, *NLRB v. Hazen, et al.*, 203 F.2d 807 (9th Cir. 1953); *Forest Lawn Memorial-Park Association, Inc.*, 97 N.L.R.B. 309 (1951), enforced, 206 F.2d 569 (9th Cir. 1953), pet. for cert. filed Oct. 26, 1953. But in view of the Board's history under the Wagner Act followed by verbatim reenactment by the Taft-Hartley Act of the provisions of such Act defining interstate commerce, the Board at those late dates was acting without jurisdiction.

Action of the court below in finding jurisdiction to exist is clearly in conflict with the following principles:

(a) The fact that powers have long been unexercised calls for close scrutiny as to whether such powers ever existed. *United States v. Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357 (1950).

(b) Refusal or failure to assert jurisdiction for a long period of time is a fact to be considered in determining non-existence of jurisdictional power. *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U.S. 349, 61 S.Ct. 580 (1941).

(c) Long-settled interpretation or practice of an agency under a statute attains the force of law upon a reenactment of the statute: *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 366, 71 S.Ct. 337, 340-341 (1951); *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 114-115, 59 S.Ct. 423, 425 (1939).

7. Pierce Insurance Company.

The court below did not consider the activities of Pierce Insurance Company in determining that petitioner was subject to the Act. While in his intermediate report the Trial Examiner included facts concerning Pierce Insurance Company in his finding of fact as to the business of petitioner, he placed no specific reliance upon such activities. It would not be proper to consider the existence of Pierce Insurance Company as a feature of this case upon which jurisdiction could be based. The interstate aspects of Pierce Insurance Company's business are completely separate and distinct from the mortuary operations and there could be no effect upon the interstate aspects of the insurance business of Pierce Insurance Company as a result of any labor practice or labor strife at the mortuaries. *National Labor Relations Board v. Shawnee Milling Co.*, 184 F.2d 57 (10th Cir. 1950); Cf. *Press Co. v. National*

Labor Relations Board, 118 F.2d 937 (D.C. Cir. 1940), cert. den. 313 U.S. 595 (1941); *National Labor Relations Board v. Condenser Corp. of America,* 128 F.2d 67 (3d Cir. 1942).

There are a large number of mortuaries in the United States which will be affected by the decision of the court below. Undoubtedly, many of the mortuaries prepare bodies which are buried in other states. If the decision of the court below is allowed to stand, an entire new field of activity may be opened by the National Labor Relations Board and its jurisdiction may even be extended to such organizations as hospitals, clinics, and other professional and services organizations. This Court should therefore grant certiorari in this case in the interest of authoritatively deciding whether it is proper for the Board to function in this field.

Conclusions.

It is respectfully urged for the reasons above stated that (1), the Court of Appeals has so misconstrued the National Labor Relations Act in finding jurisdiction of the Board to exist, has so ignored the cited decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings in enforcing the Board's order and in failing to remand the case to the Board for further proceedings, and (2), such conflicts of law and such unanswered questions exist with regard to important points of federal law, as to call for an exercise of the power of supervision of this Court.

Wherefore, petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to the end that the errors referred to may be corrected by this Court.

Dated: November 24, 1953.

Respectfully submitted,

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APPENDIX.

National Labor Relations Act as Amended.

(Title 29, U. S. C. Sections 151 *et seq.*)

"Section 1. Findings and declaration of policy. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or inter-

ruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"DEFINITIONS

"SECTION 2. When used in this Act—

* * * * * * * * *

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but

shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * * * * * * * *

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * * * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SECTION 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting

commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * * * * * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have

jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member agent, or agency shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the

district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

NATIONAL LABOR RELATIONS ACT.

(Wagner Act 49 Stat. 449.)

Section 2. Definitions

When used in this Act

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 479

PIERCE BROTHERS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below enforcing the order of the Board (R. 198-201), is reported at 206 F. 2d 569. The findings of fact, conclusions of law, and order of the Board (R. 59-63, 22-57) are reported at 97 NLRB 317.

JURISDICTION

The decree of the court below (R. 201-207) was entered on September 16, 1953. The petition for a writ of certiorari was filed on November 25, 1953.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that petitioner's operations bring it within the coverage of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix to the petition, pp. 1-6.

STATEMENT

I. *The Board's findings and order*—Petitioner, a California corporation, is engaged in the undertaking business with its offices and principal mortuary in Los Angeles, California (R. 26; 11-12). Handling more cases than any of its competitors in Los Angeles County, petitioner operates 15 mortuaries in that County and employs 207 persons, 40 of whom are embalmers and apprentice embalmers (R. 26; 12).

During the 12-month period ending March 31, 1951, petitioner purchased capital equipment, materials, and supplies of a value of approximately $590,000 (R. 26; 13). Of this amount, approximately $7,500 worth was shipped to petitioner from points outside the State of California, and $45,000 worth, while purchased locally, was originally manufactured outside the State (R. 26; 13). During this same period, petitioner provided mortuary services in 5,780 cases and received $1,900,000 for

services rendered and supplies furnished for that purpose (R. 26; 13). Of this amount, the sum of $243,131.60 was received for services and supplies furnished in connection with 544 bodies which were shipped for burial outside the State of California (R. 27; 13-14, 20-21).[1] A breakdown of the $243,131.60 shows a charge of $27.200 for shipping cases, $142,424.04 for embalming and other services, and $73,507.56 for caskets (R. 27; 13-14, 20-21).

Petitioner's total receipts also included the sum of $42,611.22 received in payment for 178 cases in which, after the services of petitioner, the bodies were cremated by petitioner's wholly owned subsidiary, Pierce Brothers Crematorium, and the remains thereafter shipped out of the State of California (R. 27; 14). The Crematorium received for its services in these 178 cases the sum of $10,276.28, representing $9,041.88 for cremations and $1,234.40 for shipping boxes and expenses (R. 27; 14).

Finally, petitioner owns approximately 98 percent of the capital stock of Pierce Insurance Company, a California corporation doing a substantial interstate business in selling funeral insurance (R. 27-28; 16-17).[2] Petitioner's president and two of its vice presidents and assistant secretaries are officers of the insurance company (R. 28, n. 5; 21).

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[1] Transportation charges, which in most instances were advanced by clients and in turn paid over by petitioner to the carrier, have not been included above (R. 15-16).

[2] The Pierce Insurance Company is licensed to do business in several states and the Territory of Hawaii. During the year 1950, it did over $25,000 worth of business in each of the states of California, Missouri, and Washington, and over $20,000 worth in Hawaii (R. 28; 16).

While that company does not confine its insurance scheme to petitioner's mortuary alone or draw its employees exclusively from that source,[3] many of petitioner's employees are selling agents for the insurance company, and all of petitioner's employees are authorized to and do accept premium payments on Pierce Insurance Company policies (R. 28, 29; 16-17).

Upon the foregoing facts, the Board found that petitioner was engaged in commerce within the meaning of the Act and that it would effectuate the policies of the Act to assert jurisdiction over petitioner (R. 29-30, 60, n. 2).

In March 1951, during the course of a union organizing campaign, petitioner interrogated employees concerning union membership and activities, threatened employees with reprisals, including discharge, if they joined the union, and discharged 15 employees because of their union and concerted activities (R. 30-49, 60). Upon these facts, not challenged here or in the court below, the Board found that petitioner had violated Section 8(a)(1) and (3) of the Act (R. 48-49, 60).

The Board's order (R. 60-63) requires petitioner to cease and desist from the unfair labor practices found and from in any other manner interfering with the rights guaranteed its employees under Sec-

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[3] Pierce Insurance Company, operating in conjunction with petitioner and 60 other independent mortuaries, offers insured funerals through the facilities of the particular mortuary covered by the policy (R. 28-29; 16-17). Employees of other mortuaries also act as selling agents and/or collection agents for the insurance company (R. 29; 16-17).

tion 7 of the Act. Affirmatively, the Board's order requires petitioner to reinstate the discharged employees with back pay and to post appropriate notices.

II. *The decision of the court below*—The court below sustained the Board's jurisdiction over petitioner and enforced the Board's order in full (R. 198-201).

ARGUMENT

This is a companion case to *Forest Lawn Memorial-Park Association, Inc.* v. *National Labor Relations Board,* No. 438, this Term, pending upon petition for certiorari,[4] and presents the same question. Petitioner here, like the petitioner in No. 438, is engaged in the mortuary business in California, purchases either from local or out-of-state sources substantial quantities of equipment, materials and supplies which are manufactured outside the state, and furnishes in substantial quantities services and supplies, including caskets and shipping cases, in connection with the shipment of bodies to points outside the State of California (*supra,* pp. 2-3). In addition, petitioner here, unlike petitioner in No. 438, owns 98 percent of the stock of Pierce Insurance Company, which sells funeral insurance in a number of states; many of petitioner's employees are also selling agents of the insurance company, and all of petitioner's employees are authorized to and do accept premium payments on the insurance company's policies (*supra,* pp. 3-4).

Petitioner resists the Board's assertion of juris-

[4] The court below disposed of both cases in one opinion.

diction over its operations, and seeks review of the decision below, for virtually the identical reasons relied on by petitioner in No. 438. For the reasons stated in the Board's brief (pp. 5-10) in opposition to the petition in No. 438, to which we respectfully refer the Court, we believe that the decision below in this case is also correct and presents neither a conflict of decisions nor any substantial question warranting review. Moreover, petitioner's close and intimate relationship with the insurance company supplies additional support for the Board's exercise of jurisdiction in the instant case. Many of petitioner's employees perform services for the closely allied insurance company; work stoppages involving these employees as a result of industrial strife attributable to unfair labor practices would have an impact not only upon petitioner's interstate operations but also upon the operations of the insurance company whose business is of an interstate character. See *Polish National Alliance* v. *National Labor Relations Board,* 322 U.S. 643; *National Labor Relations Board* v. *Tri-State Casualty Insurance Co.,* 188 F. 2d 50, 51-52 (C.A. 10).[5]

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[5] There is no conflict on this aspect of the case between the decision below and *National Labor Relations Board* v. *Shawnee Milling Co.,* 184 F. 2d 57 (C.A. 10), cited by petitioner (Pet. 14). In that case, unlike the instant case, the two businesses were wholly separate and apart, there was no identity of agents and employees, and there was "nothing in the record or in the stipulated facts which would warrant a finding that a labor disturbance in the Pauls Valley Plant would have an impact upon the operations at the Shawnee Plant, or that the discontinuance of operations at Pauls Valley would cast an undue burden upon the operations of the plant at Shawnee." 184 F. 2d at 59.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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DECEMBER, 1953.

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In the

UNITED STATES SUPREME COURT

October Term 1953

No. 479

PIERCE BROTHERS

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF OF NATIONAL FUNERAL DIRECTORS ASSOCIATION OF THE UNITED STATES, INC. AS AMICUS CURIAE

National Funeral Directors Association of the United States, Inc., a non-profit corporation, which is composed of more than twelve thousand independent Funeral Directors located in all forty-eight States of the Nation, and in Alaska, Hawaii and Puerto Rico, is filing this Brief with the consent of the Petitioner and the Respondent.

QUESTIONS PRESENTED

The question presented, to which this Amicus Curiae desires to direct this Brief is – "Does the Petitioner come within the provisions of the National Labor Relations Act as amended, insofar as Interstate Commerce is concerned?"

1. SUMMARY OF FACTS PERTAINING TO THE JURISDICTIONAL ISSUE.

The facts are well set out in the Petition for a Writ of Certiorari filed by the Petitioner herein.

2. WHY THE WRIT OF CERTIORARI SHOULD BE ALLOWED.

A. The shipping of bodies outside the State of California does not constitute "Interstate Commerce" within the meaning of the Act.

(1) The responsibility for and jurisdiction of the body ceases when the remains are delivered to the baggage agent of the carrier; consequently the Funeral Director performs no act in "Interstate Commerce."

(2) A dead human body does not constitute "property" in the normal sense of the word when we are thinking in terms of Interstate Commerce.

For hundreds of years, since the beginning of what we now know as Modern Law, it has been held that a dead human body is not "property" in any sense of the word.

In re *Wong Yung Quy on Habeas Corpus,* a case reported in *2 Fed. 624* it was held:

> "A corpse is not property, and the remains of human beings carried out of the State for burial in a foreign country are not exports within the meaning of the clause of the Constitution prohibiting the laying of imposts or duties by the State upon exports."

It was thus determined that a dead human body with its casket cannot be considered as property being exported, even when it is being carried outside the State.

In the case of *A. F. Hutchinson Land Company* v. *Whitehead Bros. Co.*, 217 N.Y.S. 413, 418, 127 Misc. 558, it was held:

> "There is no right of property in a dead body in the ordinary sense, but it is regarded as property so far as necessary to entitle next of kin to legal protection from violation or invasion of its place of burial."

See also *Northeast Coal Co* v. *Pickelsimer*, 68 S.W. 2d 760, 253 Ky. 11.

A dead body is not part of the assets of the estate.

O'Donnell v. *Slack*, 123 Cal. 285;
Enos v. *Snyder*, 131 Cal. 68, 63 P. 170;
Griffith v. *Charlotte, etc. R. Co.*, 23 S.C. 25.

It is not subject to replevin.

Keyes v. *Konkel*, 119 Mich. 550, 78 N.W. 649;
Buchanan v. *Buchanan*, 28 Misc. 261, 59 N.Y. Supp 810.

It is not property in a sense that will support discovery proceedings.

Danahy v. *Kellogg*, 70 Misc. 25, 126 N.Y. Supp 444.

It may not be held as security for funeral costs.

Jefferson County Burial Society v. *Scott*, 218 Ala. 354, 118 So. 644;
American Express Co. v. *Eppley*, 5 Ohio Dec. (Rep.) 337;
See also
Jones v. *Ashburnham*, 4 East 455, 102 Eng. Rep. 905;

Reg. v. *Fox,* 2 Ad. & El. (N.S.) 246, 114 Eng. Rep. 95;
Reg. v. *Scott,* 2 Q. B. 248, note b, 114 Eng. Rep. 97.

It cannot be withheld by an express company or returned to the sender, where shipped under a contract calling for cash on delivery.

American Express Co. v. *Eppley,* supra;
Pacific Exp. Co. v. *Gathwright,* 61 Tex. Civ. App. 587, 130 S.W. 1035.

It may not be the subject of a gift causa mortis.
Driscoll v. *Nicholls,* 71 Mass. 488.

It is not common law larceny to steal a corpse.

Toppin v. *Moriarty,* 59 N.J. Eq. 115, 44 Atl. 469;
Fox v. *Gordon,* (Pa.) 16 Phila. 185;
Hayne's Case, 12 Coke 113, 77 Eng. Rep. 1389.

Rights in a dead body exist ordinarily only for purposes of burial, and, except with statutory authorization, for no other purpose.

Southern Life & Health Ins. Co. v. *Morgan,* 21 Ala. App. 5, 105 So. 161;
Matter of Beekman St. (N.Y.), 4 Bradf. Surr. 503;
Long v. *Chicago, etc R. Co.,* 15 Okla. 512, 86 P. 289.

Since dead bodies do not constitute "property," the question might arise concerning the casket, clothing or other tangible items incident to the burial.

Funeral Directing is not a commercial business in the ordinary sense of the word; neither is the Funeral Director a "supplier." He solely renders a service. He can be

likened to the doctor, lawyer, dentist. The tangible items he uses in his profession are but incidental to the service he renders.

In the case of *Guthrie* v. *Weaver,* 1 Mo. App. 136, it was held that:

> "A coffin which, with the consent of all persons having any pecuniary interest therein, had been deposited in a grave for purposes of interment with a corpse enclosed within it, is no longer a subject of property."

Thus, when a Funeral Director administers embalming fluid to a dead body, or supplies it with a suit of clothes or a shroud, these are rendered in connection with the Funeral Director's professional services.

We thus respectfully contend that the Petitioner is not engaged in "interstate commerce" because he does not ship anything outside the State which can be legally claimed as "property," and even though it should be held that a dead human body and casket are "property" then the control and custody of the shipment ceases when the same have been delivered to the baggage agent of the carrier.

3. FUNERAL DIRECTORS AND EMBALMERS ARE "PROFESSIONAL MEN."

As "professional men" Funeral Directors and embalmers are exempt under the National Labor Relations Act as amended. *Title 29 F.C.A. par 152 (12)* of this Act provides as follows:

> "The term "professional employee" means — (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechani-

cal, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standarized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

Practically every State of the Union, including California, has a license law governing Funeral Directors and Embalmers which laws were placed on the books primarily to protect the public and to raise the standards and ethics of the Funeral Director and Embalmer.

These laws, many of which were drawn under the supervision of the General Counsel of National Funeral Directors Association of the United States, Inc., are patterned after the various State laws governing lawyers, doctors and dentists. They require extended courses of study, examination and licensing. Thus the California Law known as "The Funeral Directors and Embalmers Law, Business and Professions Code of Deering's California Codes," Article 1, § 7600 et seq. provides that the ap-

plicant for a Funeral Director's license, must be over twenty-one years of age, of good moral character and must be examined, and successfully pass the examination on —

1. Signs of death
2. Manner of determining death
3. Laws governing preparation, burial and disposal of dead human bodies and shipment thereof
4. Local health laws and regulations.
   (see paragraph 7622)

The conduct of his business is specifically regulated by rules and regulations promulgated by the State Board of Funeral Directors and Embalmers.

Embalmers are separately licensed. (Par. 7640.) Paragraph 7643 provides that the applicant for embalmer's license must:

1. Be over 21 years of age.
2. Of good moral character.
3. Furnish proof of completion of high school course or that he has been licensed and has practiced as an embalmer for three of the last seven years in another State or County and that such license was never suspended or revoked for unethical conduct.
4. Have completed two years apprenticeship under licensed embalmer in this State and practiced as such in an approved funeral establishment and assisted in the embalming of 100 human dead bodies; provided that one who has practiced embalming three of the last seven years in another State or county and never had license suspended or revoked shall serve only one year apprenticeship and shall have assisted in the embalming of 50 dead human bodies.

5. Complete course of nine months in approved embalming school on subjects set out in § 7646.

The subjects of examination are set forth in § 7646, which are as follows:

1 - Theory of embalming
2 - Anatomy, histology, embryology and dissection
3 - Pathology and bacteriology
4 - Hygiene, sanitation, health
5 - Chemistry, toxicology
6 - Restorative art
7 - Health laws and rules

Apprentice embalmers must, according to paragraph 7662 —

1 - Be over 18 years of age
2 - Of good character
3 - Furnish proof of high school completion *or* that he has practiced as an embalmer for three of last seven years in other state or county and his license was never revoked or suspended.

The Board may suspend or revoke licenses of Funeral Directors and Embalmers and apprentices after hearing. The stringency of this supervision is illustrated under Paragraph 7668 which provides as follows:

> "The Board may suspend or revoke certificate of apprenticeship when apprentice is found guilty after hearing, for the following acts or omissions:

a. Failure to devote full time to apprenticeship.
b. Failure to make reports as required to Board.
c. Absence from duty unauthorized.
d. Gross immorality.
e. On duty under influence of liquor.
f. Disobedience of orders of superior.

g. Violation of law or regulations of Board.
h. Soliciting business for funeral director or embalmer.
i. Fraud or misrepresentation.
j. Failure to pay fee.

Thus, in the eyes of the laws of California and the other States having licensing laws, and under *Title 29 F.C.A. paragraph 151 (12),* Funeral Directors and Embalmers assume the status of "professional men."

4. THE QUESTION OF WHETHER A FUNERAL DIRECTOR IS OR IS NOT IN "INTERSTATE COMMERCE" HAS BEEN DECIDED IN CASES OTHER THAN N.L.R.B. CASES.

A. Thus, under the *Motor Carrier Act of 1935 as Amended. Title 49 F.C.A., par. 301 et seq.,* it was held in 1938, *In the Matter of Maurice E. Newman of Dover, Delaware, Docket MC 18962,* by the Interstate Commerce Commission after a thorough hearing, that the Funeral Director was not engaged in Interstate Commerce, and this notwithstanding the fact that a substantial part of his equipment, caskets and fluids had been purchased outside the State of Delaware, and that about three percent of his visits in carrying on his business as a Funeral Director brought him into another State. See also case of *Union Funeral Service of Gillespie, Illinois, I. C. No. M C 67243.*

B. *Federal Wage and Hour Law.*
(Fair Labor Standards Act)
Title 29 F.C.A. Chapter 8, par 201 et seq.

Under this Act the Funeral Director is exempt as a Service Establishment, the greater part of whose selling or servicing is in intrastate commerce.

Title 29, par. 213 Exemptions (a) provides in part as follows:

> "The provisions of Sections 6 and 7 (pars. 206, 207 of this title) shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

C -*The Social Security Act as amended, Title 42, par. 411 (c) (5)* excludes self employed funeral directors, placing them in the same category as physicians, lawyers, dentists and other professional men.

Title 42 F.C.A. par 411, Self-Employment (c) Trade or Business.

> "The term "trade or business", when used with reference to self-employment income or net earnings from self-employment, shall have the same meaning as when used in Section 23 of the Internal Revenue Code (26:23) except that such term shall not include —
>
> (1) The performance of the functions of a public office;
>
> (2) The performance of service by an individual as an employee (other than service described in Section 210 (a) (16) (B) [par. 410 (a) (16) (B) of this title] performed by an individual who has attained the age of eighteen;)
>
> (3) The performance of service by an individual as an employee or employee representative as defined in Section 1532 of the Internal Revenue Code (26:1532);

(4) The performance of service by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(5) The performance of service by an individual in the exercise of his profession as a physician, lawyer, dentist, osteopath, veterinarian, chiropractor, naturopath, optometrist, Christian Science practitioner, architect, certified public accountant, accountant registered or licensed as an accountant under State or Municipal law, full-time practicing public accountant, funeral director, or professional engineer; or the performance of such service by a partnership.

During the writer's more than forty years practice of the law — and particularly as United States Attorney for the Southern District of Ohio under the Wilson Administration — we saw attempts by various governmental agencies in the administrative or executive branch, to extend their jurisdiction by amending by regulation or rule, the statutes under which they operated, yet never have we seen such an attempt as the National Labor Relations Board has been making during the past few years, even though, as stated above, every other governmental agency has held the average funeral director to be not engaged in interstate commerce — and this, even though in a case before the Interstate Commerce Commission, a part of the actual funeral service rendered, went across a state line into another State.

Not only is the National Labor Relations Board, in our opinion, attempting to improperly extend its jurisdiction by arbitrary rulings and formulae, but they are going counter to every other governmental agency and therefore,

every Act of Congress under which these other governmental bodies operate. As an example, take the Fair Labor Standards Act, which expressly exempts retail and service establishments under certain conditions. The funeral director is admittedly in the Service branch of endeavor.

In a very recent situation this Court held that professional baseball was still a sport and not a business even though it admittedly was in interstate commerce. We mention this because in our situation the National Labor Relations Board, in its attempt to obtain jurisdiction over another line of endeavor, is not only making Interstate out of Intrastate, but is endeavoring to take Funeral Services out of the service category.

As a matter of fact, if the average funeral director is subject to the jurisdiction of the National Labor Relations Board, then in our opinion, every corner drugstore and small retail establishment, every barber shop and other service enterprise, in fact, everybody is engaged in interstate commerce and should be subject to the supervision of the National Labor Relations Board. This I do not believe was ever intended by Congress or it would not have passed the laws creating the Federal Trade Commission, the Interstate Commerce Commission, the Wage and Hour Division, and others.

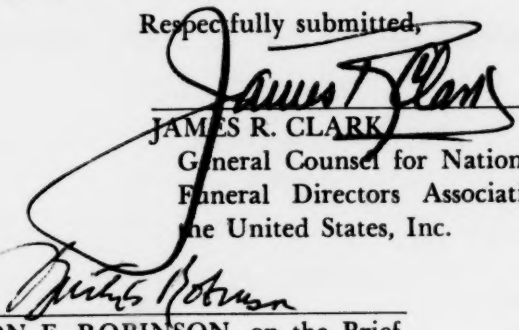
5. CONCLUSION

It is respectfully submitted for the reasons above set forth that the Court of Appeals has wrongfully held that the National Labor Relations Board had jurisdiction in this case, and its decision is of such far-reaching consequence that the Writ should be granted and that this Honorable

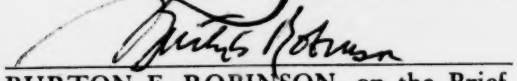
Court may once and for all time properly define the status of a Funeral Director and Embalmer insofar as the National Labor Relations Act is concerned.

Dated January 4, 1954.

Respectfully submitted,



JAMES R. CLARK,
General Counsel for National Funeral Directors Association of the United States, Inc.



BURTON E. ROBINSON, on the Brief.

7 See p 6

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 479

PIERCE BROTHERS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF NATIONAL SELECTED MORTICIANS, INC., AS AMICUS CURIAE.

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QUESTION PRESENTED.

The question presented is whether a labor dispute in a mortician establishment affects interstate commerce within the meaning of the Commerce Clause of the Constitution and the National Labor Relations Act, as amended.

Facts Pertaining to the Jurisdictional Issue. The facts are well stated in the petition for a writ of certiorari filed by the petitioner herein.

Reasons Relied on for Allowance of the Writ. It is of national importance for this Court to decide whether federal jurisdiction under the Commerce Clause and the National Labor Relations Act, as amended, extends to the services of a mortician in the preparation and burial of dead bodies of human beings.

The services rendered by a mortician in preparing dead bodies for burial and supervising funerals have always been considered services of a wholly local nature; more so than the baseball exhibitions which this Court held to be "purely State affairs" in *Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs,* 259 U. S. 200, 208, and more so than vaudeville acts in *Hart* v. *B. F. Keith Vaudeville Exchange,* 12 F. 2d 341. In those cases it was held that the transportation across State lines was a mere incident, not the *essential thing.* Here the "essential thing" is the burial or other disposition of dead bodies which now, as at the time of the adoption of the Constitution, normally occurs where the deceased persons resided at death. In the early days "graves were crowded in the churchyard, and in the larger towns dead persons of dignity were buried, as in England, under the church." *Customs and Fashions in Old New England* (Charles Scribner's Sons, 1894) by Alice Morse Earle, page 380. Now our communities have cemeteries but the nature of the services performed by the undertaker

has remained the same. The "essential thing" bears no relation whatever to the basic grant to the federal government of power "to regulate Commerce with foreign Nations and among the several States * * *."

The nation is entitled to a definitive ruling from its highest tribunal as to whether such services, which heretofore have been traditionally regarded as among the most local of human activities, have finally come under the control of the federal government. Dead bodies of human beings are not articles of commerce, nor even property. Occasional delays in the burial of bodies could not threaten, obstruct or unduly burden commerce between the States. The bodies simply would be buried at some later date. The situation is unique and is not analogous to commercial ventures involving articles of trade.

The fact that as an incident to his services a mortician makes use of embalming fluid, caskets and packing cases which could be articles of trade, and do cross State lines, does not change the essential character of his occupation. In *Young* v. *Kellex Corporation,* 82 F. Supp. 953, the materials and equipment required in connection with the manufacture of the atomic bomb must have been enormous, yet federal jurisdiction under the Fair Labor Standards Act was denied because the atomic bomb was not an article of commerce. The incidental use of medicines and equipment did not mean that the practice of the healing arts was trade or commerce in *Spears Free and Clinic Hospital* v. *Cleere,* 197 F. 2d 125.

In considering the cases under the National Labor Relations Act this Court's opinion in the initial case, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, is informative. At pages 30-32 this Court said:

> "The authority of the federal government may not be pushed to such an extreme as to destroy the distinc-

tion, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

* * * * *

"The jurisdiction conferred upon the Board, and invoked in this instance, is found in § 10 (a), which provides:

'Sec. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.'

"The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are 'affecting commerce.' The Act specifically defines the 'commerce' to which it refers (§ 2 (6)):

'The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.'

"There can be no question that the commerce thus contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The Act also defines the term 'affecting commerce' (§ 2 (7)):

'The Term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.'

"This definition is one of exclusion as well as inclu-

sion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. See *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 570; *Schechter Corp.* v. *United States, supra,* pp. 544, 545; *Virginian Railway* v. *System Federation,* No. 40, 300 U. S. 515. It is the effect upon commerce, not the source of the injury, which is the criterion. *Second Employers' Liability Cases,* 223 U. S. 1, 51. Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise."

In *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, this Court upheld the jurisdiction of the National Labor Relations Board over a small manufacturing business, employing from 60 to 200 employees, where a product was regularly shipped in interstate commerce and said further that "* * * an employer may be subject to the National Labor Relations Act although not himself engaged in commerce. The end sought in the enactment of the statute was the prevention of the disturbance to interstate commerce consequent upon strikes and labor disputes induced or likely to be induced because of unfair labor practices named in the Act."

A test of the Board's jurisdiction is whether a stop-

page of an employer's operations on account of his labor difficulties would result in substantial interruption to or interference with the free flow of interstate commerce.

The Court below in the instant case (206 F. 2d 569, 571) said:

> "Respondents argue that their services and business are of a purely local nature not involving commerce, hence the Board is without jurisdiction in the premises. In *N. L. R. B.* v. *Hazen*, 9 Cir., 203 F. 2d 807, the employers charged with violations were engaged in the same character of business as here and were rendering the same sort of services, although on a smaller scale. In that case we thought the business and services were of such nature as to give the Board jurisdiction, and that the amount of the interstate business done was sufficient to avoid the *de minimis* rule. We are of like opinion here."

But the answer to the question here is in no way dependent upon the *de minimis* rule. On the contrary, the question raised here is whether commerce is involved in any degree whatever in the unique service of preparing dead bodies of human beings for burial or other disposition and in supervising funeral services.

Cases relied on by the National Labor Relations Board, such as *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675; *Local 74, United Brotherhood of Carpenters & Joiners* v. *National Labor Relations Board*, 341 U. S. 707, and *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694, are clearly not in point since they involve commercial building construction, a subject matter closely related to trade and commerce.

There can be no interstate commerce by a mortician in the preparation of dead bodies of human beings for final disposition and in the supervision of funerals. The mortician's services no more affect interstate trade or commerce

than the services usually performed by a priest, minister, or rabbi over the dead body. His purchase of caskets, shipping cases and embalming fluids are purely incidental to his essential function. Actually there is a unique analogy here also in that those articles have the same destination as the dead bodies.

CONCLUSION.

The activities of Pierce Brothers did not constitute interstate commerce within the meaning of the Commerce Clause of the Constitution, nor affect interstate commerce within the meaning of the National Labor Relations Act as amended.

We respectfully ask that the Petition of Pierce Brothers for a Writ of Certiorari herein be allowed.

Dated February 6, 1954.

Respectfully submitted,

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